Supreme Court, U. S.
FILED
FEB 21 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-602

DONALD W. AGINS and BONNIE G. AGINS,

Appellants,

vs.

CITY OF TIBURON,

Appellee.

Appeal From The Supreme Court Of California

BRIEF OF AMICUS CURIAE SAN DIEGO GAS & ELECTRIC COMPANY

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BRIEF OF AMICUS CURIAE SAN DIEGO GAS & ELECTRIC COMPANY

Pursuant to Supreme Court Rule 42, San Diego Gas & Electric Company, respectfully submits this brief amicus curiae in support of the Appellants, Donald and Bonnie Agins. Counsel for both parties have consented to the filing of the brief. Copies of the letters of consent have been lodged with the Clerk of this Court.

INTEREST OF AMICUS CURIAE

The Agins appeal from the decision of the California Supreme Court, *Agins v. City of Tiburon,* 24 Cal.3d 266 (1979), which held that a property owner can *never* state a cause of action for inverse condemnation seeking monetary compensation against a governmental body for arbitrary, excessive, and unconstitutional land use regulations which the property owner asserts have deprived the property of all use or value.

Your amicus believes that a remedy in money damages for inverse condemnation is mandated by sound public policy as an indispensable check against arbitrary and capricious excesses of the police power, by the precedents established by this Court in interpreting and applying the Constitution, and by the express guarantees of the Fifth and Fourteenth Amendments to the United States Constitution.

The issues presented in this case are matters of great concern to your amicus. San Diego Gas & Electric Company is a privately owned public utility serving San Diego County, California. In this capacity it is concerned with and involved in land use planning, both in connection with its own operations and in promotion of the public welfare. San Diego Gas & Electric Company is also the owner of a substantial amount of real property and stands, as a private property owner, in a position that is somewhat similar to that of the property owners in the case before this Court, having been denied access to the remedy of damages for a regulatory "taking." However, in your amicus' case the denial came after a full evidentiary presentation and factual findings by the trial court, affirmed by the court of appeal, that the course of action of the City deprived it of all

practical, beneficial or economic use of its land, and had effected a "taking" of property, entitling it to just compensation.

The court of appeal found on reconsideration of the case that the rule and rationale of the *Agins* decision necessitated a reversal of its earlier decision, for the clear message of the *Agins* opinion was that a cause of action in inverse condemnation for money damages can *never* be stated against a governmental body for even the most egregious abuse of the police power. Your amicus, San Diego Gas & Electric Company, has appealed its case to this Court, but no action has yet been taken on its appeal.[1]

The Agins, and your amicus, have been denied fundamental property rights which are guaranteed by the just compensation clause of the Fifth Amendment. Your amicus joins with the Agins in urging this Court to reaffirm the availability of the inverse condemnation damage remedy to private property owners challenging the excessive and unconstitutional regulatory action of the government in the land use area.

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[1] The Jurisdictional Statement of San Diego Gas & Electric Company appealing from the adverse "reconsideration" ruling in its case, *San Diego Gas & Electric Co. v. City of San Diego,* by the California Court of Appeal, premised on the *Agins* decision, was docketed with this Court on October 26, 1979, No. 79-678. The full procedural history of the case as well as the full text of the opinions of the trial court and court of appeal are available in the Jurisdictional Statement and Appendix filed with this Court by San Diego Gas & Electric Company in that case. Extensive reference is made to the facts of that case in this amicus brief at page 15 through 21, *infra.*

ARGUMENT

I

THE CALIFORNIA SUPREME COURT HAS DENIED THE AVAILABILITY OF THE CONSTITUTIONALLY MANDATED REMEDY OF JUST COMPENSATION FOR A REGULATORY "TAKING."

The major issue presented to this Court by the *Agins* appeal can be very simply stated:

> Can a private property owner who asserts that his land has been deprived of all practical, beneficial and economic use as a result of the land use regulatory actions by a governmental entity state a cause of action in inverse condemnation seeking money damages?

The California Supreme Court affirmed the dismissal of the *Agins* complaint without allowing any factual inquiry to be made,[2] and did not even reach the issue of whether a "taking" had occurred under the facts of the case, nor whether in this particular case the allegations were true, nor even what are the proper factors to be considered in resolving the issue. The court

[2] As Appellants have pointed out in their Jurisdictional Statement at page 5, n. 1, and Reply Brief at page 6, n. 7, the facts alleged in the complaint were, as they must be, treated as being true. The City of Tiburon's statement (Motion to Dismiss or Affirm at page 5) that the Court's ruling was somehow premised on the fact that the face of the ordinance appears to permit some use, ignores the true nature of the Agins' allegations, established rules of pleading and the statement of the California Supreme Court itself.

ruled as a matter of law that no constitutional cause of action for a "taking" exists in this situation. This Court is asked by Appellants and your amicus to reaffirm that a cause of action for damages does exist for a property owner who alleges that land use regulations or activities are confiscatory.

In their complaint against the City of Tiburon the Agins alleged that the effect of the actions of the City in adopting an open space ordinance and the application of its restrictive limitations to their property completely destroyed its use and value for any purpose whatsoever, and prevented any sale, transfer or development of the property, all without due process of law and without compensation in violation of the Fifth and Fourteenth Amendments.[3]

As the California Supreme Court viewed the case, the issue was:

> [Whether] a local entity's exercise of its police power which, in a given case, may exceed constitutional limits is equivalent to the lawful taking of property by eminent domain thereby necessitating the payment of compensation.
> 24 Cal.3d 266, 272.

The California Supreme Court's answer was clear : An inverse condemnation suit and the remedy of money damages is *never* available to a property owner who alleges his property has been "taken" by a government's purported exercise of its police powers. Instead, the court selected what it described as a more

[3] Complaint, paragraphs IX, X, XXVI, XXVIII. See Appellants' Joint Appendix at 8, 11, 12.

"desirable" remedy for such situations -- invalidation of the regulation.

> We are unable to accept [the view that the "exercise of the police power which . . . exceed[s] constitutional limits is equivalent to . . . taking of property"] believing the preferable view to be that, while such governmental action is invalid . . . remedy by way of damages in eminent domain is not thereby made available.
>
> . . . .
>
> We are persuaded by various policy considerations to the view that *inverse condemnation is an inappropriate and undesirable remedy* in cases in which an unconstitutional regulation is alleged.
> 24 Cal.3d at 272, 275. (Emphasis added.)

The California Supreme Court's decision in *Agins* has elevated the police power of the government to a special, protected position and immunized all regulatory actions purportedly exercised pursuant to the police power from the Fifth Amendment guarantee of "just compenstion," even where the net effect of such regulations or actions is alleged and shown to be the deprivation of all use and value of the land.

The California Supreme Court presumed that the exercise of the police power, even when invalid, excessive, arbitrary, and unconstitutional, does not and cannot involve "taking" implications. The underlying premise of that position is that "taking" jurisprudence is limited to physical invasion or appropriation of property and simply does not occur where "mere" regulatory action is involved. Moreover, the court perceived monetary

compensation to be an "inappropriate and undesirable remedy," even assuming the property owner was denied all use of his land. The court stated that it felt that decisions in the land use planning area require flexibility and freedom and that the threat of unanticipated financial liability would intimidate and discourage innovative land use planning. 24 Cal.3d 266, 275-277.

Your amicus submits that the principles elucidated by this Court in its past decisions shaping the jurisprudence of the Fifth Amendment injunction that private property is not to be taken for public use without just compensation, reveal that the California Supreme Court's resolution of this issue is simply wrong and must be reversed.

II

THE PREVIOUS DECISIONS OF THIS COURT AND LOWER FEDERAL COURTS HAVE AFFIRMED THE AVAILABILITY OF "JUST COMPENSATION" FOR A REGULATORY "TAKING."

A. The Jurisprudence Of The "Taking" Provision Of The Fifth Amendment.

The Fifth Amendment prohibition, "nor shall private property be taken for public use, without just compensation" is applicable to the states through the Fourteenth Amendment. *Chicago, B. & Q. Railroad v. City of Chicago*, 166 U.S. 226, 239, 241 (1897).

What is a "taking" and whether a "taking" has occurred are issues that have been discussed by this Court and lower federal courts for over a century. The earlier cases confronted situations where there was physical invasion of property by the government and held such action to be a "taking" requiring compensation. *Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall.) 166 (1871); *Hurley v. Kincaid,* 285 U.S. 95 (1932).

However, this Court long ago rejected the notion that a "taking" occurred only when there was a physical invasion or appropriation of property. *Dugan v. Rank,* 372 U.S. 609, 625 (1963); *accord, Penn Central Transportation Co. v. City of New York,* 438 U.S. 104, 123 n. 25 (1978).[4] It has also clearly

[4] In *Penn Central* this Court had the opportunity to review an attempt by a state court to isolate and sever invalid exercises of the police power from the consequences of the constitutional requirement of just compensation. Judge Breital, of the New York Court of Appeal, first in *Fred R. French Investing Co. v. City of New York,* 385 N.Y.S.2d 5 (1976), *appeal dismissed,* 429 U.S. 990, and then in *Penn Central,* 397 N.Y.S.2d 914 (1978) sought to effect a theoretical and conceptual separation of due process and eminent domain analysis, which, like the *Agins* decision, resulted in the rejection of the notion that invalid police power regulation can also involve a "taking" requiring the payment of "just compensation." 385 N.Y.S.2d 5, 8, 397 N.Y.S.2d 914, 917. The New York court, like the California Supreme Court in *Agins,* held that in these situations the remedy available to the property owner is not damages, but invalidation of the regulation. *Fred French, supra,* 385 N.Y.S.2d 5, 8, 10; *Penn Central, supra,* 397 N.Y.S.2d 914, 917; *Agins, supra,* 24 Cal.3d 266, 272, 276-277.

This Court in *Penn Central* while agreeing no "taking" had occurred, flatly rejected the lower court's analysis that "taking" jurisprudence was limited to physical appropriation in distinction to regulatory action. 438 U.S. 104, 123 n. 25. The Court decided the case using traditional "taking" analysis.

(footnote cont'd next page)

established that a "taking" can occur when a regulation "goes too far." *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 415 (1922); *Penn Central, supra,* 438 U.S. 104, 127 (1978).

In *Richmond Elks Hall Assn. v. Richmond Redevelopment Agency,* 561 F.2d 1327 (9th Cir. 1977), the Ninth Circuit Court of Appeals summarized this Court's past decisions on "taking":

> '[T]o constitute a taking under the Fifth Amendment it is not necessary the property be absolutely "taken" in the narrow sense of that word to come within the protection of this constitutional provision; it is sufficient if the

(footnote 4 cont'd from previous page)

Commentators likewise had rejected the theoretical distinction which some, including the California Supreme Court, have urged between regulations purportedly exercised pursuant to the police power (for which the remedy is invalidation) and eminent domain power (for which the remedy is damages), and found such distintions to be "illusory." *See,* Waite, *Governmental Power and Private Property,* 16 Cath.U.L.Rev. 283, 292 (1967).

> Constitutional rights rest on substance, not on form . . . a legal restriction upon the use of land may constitute a taking, although the title is unaffected and the land is physically untouched.
> 2 *Nichols on Eminent Domain,* § 6.1[a] (3rd ed. 1976).

See also, Berger, *To Regulate, Or Not To Regulate -- Is That The Question? Reflections on the Supposed Dilemma Between Environmental Protection and Private Property Rights,* 8 Loy. L.A.L.Rev. 253 (1975); Netherton, *Implementation of Land Use Policy: Police Power v. Eminent Domain,* 3 Land & Water L.Rev. 33 (1968); Van Alstyne, *Taking or Damaging by Police Power: The Search For Inverse Condemnation Criteria,* 44 S.Cal.L.Rev. 1 (1971).

> action by the government involves a direct interference or disturbance of property rights. [citations omitted.] Nor need the government directly appropriate the title, possession or use of the properties. . . .' [Citation omitted.] 561 F.2d 1327, 1330.

Rather, a "taking" occurs:

> When a public entity acting in furtherance of a public project directly and substantially interferes with property rights and thereby significantly impairs the value of the property, the result is a taking in the constitutional sense and compensation must be paid. [Citations omitted.] 561 F.2d 1327, 1330.

The needs of modern society, with the rapid growth of cities and urban density, the rapidly growing role of the government seeking to promote the common good, have created complex problems for this Court in determining when governmental action has gone "too far" and sacrificed the rights of individual citizens resulting in the "taking" of a private property interest.

To meet the complexity of the challenge and to assure that the courts remain sensitive to and aware of the competing needs in a changing world, this Court has affirmed that an inverse condemnation remedy is available to challenge regulation which goes "too far," but held that the resolution in each case must be addressed on an individual basis.

> This is not to say, however, that governmental activities in the form of regulation cannot be so onerous as to constitute a taking which constitutionally requires compensation [citation

> omitted]. There is no set formula to determine where regulation ends and taking begins. *Goldblatt v. Town of Hempstead,* 369 U.S. 590, 594 (1962).

The rationale underlying the prohibition on government actions and the protection to the property owner afforded by the Fifth Amendment has been clearly articulated by this Court:

> The Fifth Amendment's guarantee that private property shall not be taken for public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole. *Armstrong v. United States,* 364 U.S. 40, 49 (1960).

As Justice Holmes noted:

> [A] strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change. *Pennsylvania Coal, supra,* 260 U.S. 393, 416 (1922).

B. Recent Decisions Of This Court Have Reaffirmed The Availability Of The Damage Remedy For Regulatory "Taking" And Required A Factual, Ad Hoc, Case-By-Case Resolution.

1. The Damage Remedy Is Available.

The validity and vitality of the constitutional principles just reviewed were reaffirmed by this Court in *Penn Central, supra,*

438 U.S. 104, 123-128 (1978). The Court in *Penn Central* held that land use regulatory restrictions do indeed involve Fifth Amendment considerations and compensation is available as a remedy. When such a regulatory "taking" has occurred, this Court said, the property owner is to be "compensated," for the government is "*to pay* for any losses proximately caused by it. . . ." 438 U.S. 104, 124.

Last term in *Lake Country Estates v. Tahoe Regional Planning Agency,* ___ U.S. ___, 99 S.Ct. 1171, 1176-1177 (1979), this Court expressly held that a damage cause of action could be stated against a bi-state regional agency for allegedly arbitrary and unreasonable land use regulations. The inherent and essential premise of that position is that a cause of action alleging a "taking" and seeking "just compensation" *can* be stated by an aggrieved property owner against a governmental agency.

Again, only two months ago the Court through Justice Rehnquist, in the case of *Kaiser Aetna v. United States,* ___ U.S. ___, 100 S.Ct. 383 (1979) cited the *Penn Central* standards approvingly, and found a "taking."

Lower federal courts relying on the clear precedents of the Court have likewise held that money damages are available for interferences with property rights by the exercise of the police power.

> [A] governmental agency acting pursuant to the States' police power must pay just compensation for any taking it effects.
> *Richmond Elks Hall Assn., supra,* 561 F.2d 1327, 1332.

See also, Gordon v. City of Warren, 579 F.2d 386 (6th Cir. 1978); *Dahl v. City of Palo Alto,* 372 F.Supp. 647 (N.D. Cal. 1974).

The position of the California Supreme Court in *Agins* denying the availability of the damage remedy is, quite frankly, untenable and shocking when viewed against these well-established constitutional principles and precedents. The purported "undesirable" nature of the inverse condemnation remedy from a social policy standpoint is no basis for ignoring the constitutional guarantees.

2. Whether A "Taking" Has Occurred Requires A Factual, Ad Hoc, Case-By-Case Resolution.

The determination of whether particular regulatory restrictions have resulted in a "taking" (an issue that could not be reached by the California court because of its erroneous conclusion on the preceding issue) has proved "to be a problem of considerable difficulty," for which the Court has indicated it had not yet developed a set formula. *Goldblatt v. Town of Hempstead, supra,* 369 U.S. 590, 594; *Penn Central, supra,* 438 U.S. 104, 124; *Andrus v. Allard,* ___ U.S. ___, 100 S.Ct. 318 (1979); *Kaiser Aetna, supra,* 100 S.Ct. 383 (1979). In *Penn Central* this Court specified that in each case where such an allegation is made the resolution will depend on an "ad hoc, factual inquiry" based on the particular circumstances of each case (438 U.S. 104, 124), looking to the consequences and impacts of the actions. The Court also identified those factors which it felt were "particularly significant" in determining whether a "taking" has occurred:

> (1) [T]he extent to which the regulations has interfered with the distinct investment-backed expectations [of the claimant] . . . .
>
> (2) [T]he character of the governmental action.
>
> (3) The economic impact of the regulation on the claimant; . . .
> *Penn Central, supra, 438 U.S. 104, 124.*

See also Kaiser Aetna, supra, 100 S.Ct. 383.

Your amicus contends that when a complaint alleges that the *effect* of a regulation or action has resulted in a loss of all value and use of private property as does the Agins' complaint, it is constitutionally impermissible, based on the precedents and principles established by this Court, and a violation of the express guarantees contained in the Fifth Amendment, for a state court to rule that a cause of action for damages in such a situation can never be stated. When the challenge to and the allegation of "taking" arises not from the face of ordinance but from the *effects* of the actions of governmental body and the *effect* of the regulatory restrictions on the property, it is improper and a violation of elementary rules of pleading, to dismiss such a complaint looking only to the face of the ordinance[5] and refuse to allow the full factual inquiry into the allegations as required by this Court. The Agins have in their complaint stated a constitutional cause of action in inverse condemnation against the City of Tiburon and they must be allowed to proceed to a trial on that issue to prove their allegations.

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5 As already pointed out in note 2, *supra,* this was not the basis for the California court's holding, but in any event, its holding cannot be rationalized *post hoc* on this basis.

III

A REAL WORLD EXAMPLE OF THE NEED FOR THE DAMAGE REMEDY TO ASSURE FAIRNESS AND JUSTICE IN THE LAND USE REGULATION CONTEXT.

A. A Case Study In Regulatory "Taking" : Property Can Be "Taken" As Easily And Effectively By Regulation As By Physical Invasion.

As a practical matter, to permit a property owner who has alleged that a "taking" has occurred as a result of the *impact* and *effect* of regulatory activities on his property to prove his allegations is not an empty routine or formalism. This can be vividly demonstrated by looking to the case of *San Diego Gas & Electric Co. v. City of San Diego,* currently on appeal to this Court, Docket No. 79-678,[6] which case also strikingly demonstrates the drastic and unfair consequences to a property owner which flow from the application of the rule and rationale in *Agins.*

The property owner, San Diego Gas & Electric Company, in 1974 filed a complaint against the City of San Diego seeking damages on a theory of inverse condemnation alleging that the

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6 See footnote 1, *supra. San Diego Gas & Electric Co. v. City of San Diego,* 146 Cal.Rptr. 103 (1978), (hearing granted by California Supreme Court 7/13/78, retransferred to California Court of Appeal on 6/14/79, redetermined by California Court of Appeal by unpublished opinion dated 6/26/79, petition for rehearing denied 7/9/79, petition for hearing in California Supreme Court denied 8/22/79, appeal docketed in United States Supreme Court 10/26/79 as No. 79-678).

continuing course of conduct of the City of San Diego in its regulatory zoning and planning activities (rezoning and designating plaintiff's property as agricultural and industrial, but including the property within the "open space" element of the general plan, while commencing but then abandoning, direct condemnation efforts) rendered its property economically useless, of no value, and effected a "taking" of private property without compensation in violation of the California and United States Constitutions. The matter proceeded to trial for a full factual exploration of the property owner's allegations.

At the trial the property owner presented a full panoply of evidence to support its "taking" allegation. The trial was held two years prior to this Court's decision in *Penn Central, supra,* 438 U.S. 104 (1978); nonetheless when the trial record is examined it interestingly reveals that the evidence presented by the property owner tracks the factors this Court later found in *Penn Central* (and reaffirmed in *Kaiser Aetna*) to be "particularly significant" in showing that a "taking" has occurred.

The property owner presented evidence to establish that a protectable property interest was involved and that it had "district investment-backed expectations" as to the property:

> The property owner acquired the land for a specific purpose, industrial, as a future site for a power plant. The property owner discussed its intentions and plans for the use of the site with the City. In assembling the size parcel needed for its expected use the property owner acquired, at fair market value, some 25 acres from the City of San Diego itself. At the time of acquisition, the

> General Plan of the city and the zoning permitted the use property owner intended and expected to make of the property.[7]

The property owner presented evidence to establish the arbitrary, excessive, and unconstitutional "character of the actions" of the City:

> At the time of acquisition, under the General Plan and zoning regulations, the property owner could have used the property for its intended industrial purpose. Subsequent to plaintiff's acquisition of the land, the City commenced but abandoned direct acquisition of the property for use as park and open-space. The City rezoned some of the land from industrial to agricultural. The City revised its General Plan and adopted an open-space element including the subject property within the area designated as "open-space." Industrial use is not consistent with "open-space" designation. The City as a matter of policy requires consistency between zoning and its General Plan.[8]

The property owner presented evidence to demonstrate that the "economic impact" of the regulatory actions on its property was to frustrate its expectations and to render the property economically useless and without value:

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[7] The evidence presented by the property owner is set forth by the trial judge in the Findings of Fact and Conclusions of Law and in the original opinion of the court of appeal which appear in the Appendix which accompanied San Diego Gas & Electric Company's Jurisdictional Statement ("SDG&E Appendix"), filed on October 26, 1979, Docket No. 79-678 at SDG&E Appendix, A-2 through A-8 and B-1 through B-14.

[8] See note 7 *supra*.

> Some of the land was zoned agricultural but could not be used for that purpose because of the soil's high salt content. The land could not be used for residential or any similar use because it is in a flood plain. The land's only possible economic use was for industrial purposes, but no industrial use was possible. The subject property was included within the open-space element of the City's General Plan, and evidence showed that as a matter of policy the City requires a use consistent with the open-space designation. Industrial use was not consistent with the open-space designation.[9]

Following the presentation of the evidence the trial court concluded:

> [P]laintiff has been deprived of all practical, beneficial or economic use of the property. . . .
>
> . . . .
>
> In light of the particular characteristics of the said property, there exits no practical, beneficial or economic use of the said property. . . .
>
> . . . .
>
> The actions of the city were motivated to achieve a public purpose, namely, preservation of open space . . . and were so burdensome and oppressive as to deprive plaintiff of any practical, beneficial or economic use of the property . . . and, therefore, taken as a whole,

9 See note 7 *supra*.

> constitute a taking . . . without due process of law and just compensation.[10]

The judgment and award of compensation was originally affirmed by the California Court of Appeal. In reviewing the case the court articulated what it understood to be the proper constitutional standards for evaluating whether a "taking" has occurred:

> [T]here is no set formula . . . to draw the line where regulation ends and taking begins.
>
> . . . .
>
> [Whether] there has been inverse condemnation through excessive regulation is a factual matter. . . .
>
> . . . .
>
> Whether what may have begun as a legitimate use of the police power became so unreasonable as to be a taking is a question of fact.[11]

Reviewing the evidence in detail, the court of appeal affirmed the conclusion that the City's entire course of action ("the zoning on the property plus its inclusion in the open space element plus the City's policy of requiring consistency between zoning and the general plan plus City's overtures to purchase the land for open space,"[12] resulted in the deprivation of all

10 SDG&E Appendix A-7, A-8.

11 SDG&E Appendix B-4, B-6, B-13. 146 Cal.Rptr. 103, 110, 112, 118.

12 SDG&E Appendix B-8. 146 Cal.Rptr. 103, 114.

practical, beneficial, and economic use of the land and was "an example of inverse condemnation and the landowner should, under the Constitution, be compensated."[13]

It is difficult to envision a better example of a state court following what until *Agins* was understood to be required in a "taking" case under the precedents established by this Court and the express language of the Constitution. The case convincingly demonstrates the validity and the need for allowing a plaintiff who has alleged that the impact or effects of excessive regulatory actions have resulted in a "taking" of his property to proceed past the pleading stage to prove his allegations. Although, in isolation the zoning ordinance on its face perhaps did not appear clearly confiscatory and the regulatory planning actions on their face perhaps did not appear clearly excessive, *when full factual inquiry was made into the character of the action, and the nature and extent of the interference with the rights of the property owner, and the economic impact of the regulation on the claimant, it was clear that a constitutional "taking" had been effected.* The principles of justice and fairness upon which the Fifth Amendment is premised required that the "economic injuries caused by public action be compensated by the government." *Penn Central, supra,* 438 U.S. 104, 124.

The total abrogation of property rights which flows from the rule announced by California Supreme Court in *Agins,* is lucidly shown by the result in the *San Diego Gas & Electric Company* case following *Agins.* Despite the full factual inquiry by the trial court and the conclusion by both the trial court and the California Court of Appeal that the action did result in a

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13 SDG&E Appendix B-8. 146 Cal.Rptr. 103, 114.

"taking" requiring compensation, when the case was "reconsidered" in light of *Agins,* it was found:

> A local entity's arbitrary unconstitutional exercise of the police power does not require compensation. . . .
>
> . . . .
>
> The judgment is reversed.[14]

B. Invalidation Is Constitutionally And Practically An Inadequate Remedy.

The remedy of invalidation found by the California Supreme Court to be more "desirable" and "appropriate" in situations where excessive regulatory action are challenged is illusory when examined in the context of "real" cases, and is constitutionally inadequate.

The illusory nature of the remedy is again demonstrated by the *San Diego Gas & Electric Company* case, where more than six years after the conceded confiscation of private property, and after four separate levels of judicial review, the property owner is still without relief, while its property is being used for benefit of the public as open space.[15] Moreover, what San Diego Gas & Electric Company alleged in its complaint and proved at trial was that the entire course of conduct of the City,

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14 SDG&E Appendix G-4.

15 The ineffectiveness of the invalidation remedy as a procedural matter in California has already been pointed out to the Court in Appellant's Jurisdictional Statement. J.S. 28-29.

not just a specific regulation, resulted in the "taking." As a practical matter, how can a course of conduct be invalidated? And what is to prevent repetition of a similar course of conduct, with only slight modifications?

So too in the instant case, while a specific ordinance is involved, the *Agins* have not alleged that that ordinance on its face constitutes a "taking" or that the ordinance by itself constitutes a "taking," but rather that the ordinances as *applied* when combined with the *effects* of other actions of the city constitute a "taking."

As a constitutional remedy, invalidation is inadequate to protect private property rights. The California Supreme Court, while giving superficial lip service to the property concepts protected by this Court (*Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972); *U.S. v. General Motors Corp.*, 323 U.S. 373, 377 (1945)), effectively repealed private property rights in California and "pronounce[d] that henceforth in California title to real property will no longer be held in fee simple but rather in trust for whatever purposes and uses a governmental agency exercising legislative power elects, without compensation." 24 Cal.3d 266, 282 (Justice Clark, dissenting).

Your amicus submits that to deny *categorically* the damage remedy for inverse condemnation to a property owner, when a regulatory "taking" is alleged and when it has been found upon full factual inquiry to have occurred, is to vitiate the constitutional guarantee, "nor shall private property be taken, without just compensation."

CONCLUSION

The California Supreme Court in the *Agins* decision has immunized all land use regulatory activities purportedly exercised pursuant to the police power from the reach of the Fifth Amendment guarantee of just compensation. Your amicus believes that the decision has effectively rewritten and abrogated private property rights guaranteed under the Fifth Amendment of the United States Constitution creating a significant exception to the protections of the Fourteenth Amendment due process clause.

Governmental regulatory activities in the land use planning area exercised under the guise of its "police powers" should not and cannot be *categorically* immunized from "taking" consequences. The good intentions and nobility of the land use planners goal of preserving the environment and urban aesthetics by designating land as open space and restricting the use that can be made of such land do not make these actions exempt from the constitutional mandate that when these regulations go too far and private property is "taken" for public use just compensation must be paid to the property owner under the express guarantee of the Fifth Amendment and the precedents of this Court.

The remedy of "just compensation" is not an "optional" remedy to be selected or cast aside by a state court because it perceives another remedy, in this case, invalidation, to be more desirable. If the Fifth Amendment guarantee of "just compensation" for the "taking" of property, designed to assure that the individual property owner is not asked to bear more than his fair share, is to have continued vitality and meaning in modern society a cause of action for damages must remain available as a

remedy to a property owner who alleges a "taking" of his property by excessive regulation. Your amicus believes that the decisions of this Court clearly establish that the inverse condemnation remedy is available where excessive regulation is alleged to constitute a "taking," just as it is available to a property owner who alleges a "taking" through physical invasion of his land by the government.

The California Supreme Court in its *Agins* decision has proceeded oblivious to, and perhaps in contempt of, these long-standing Federal precedents. The absolutely fundamental nature of the Fifth Amendment guarantees will not permit countenancing state court experimentation on the basis of social "desirability." It is once again time for this Court to reaffirm that private property rights and the Fifth Amendment guarantees still have meaning in California.[16]

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[16] In another recent decision by the California Supreme Court, *Robins v. Pruneyard Shopping Center,* 23 Cal.3d 899 (1979), the court again relegated private property rights to an inferior position, despite the express guarantees of the Fifth and Fourteenth Amendments and the clear precedent established by this Court in *Lloyd Corp. v. Tanner,* 407 U.S. 551 (1972). Review was granted by this Court on November 13, 1979, No. 79-289.

The California Supreme Court, although having the benefit of strong dissents in both *Robins* and *Agins* highlighting federal precedents, seems to be unable to accept a basic tenent of our judicial system: under the supremacy clauses of both the United States Constitution (article 6) and the California Constitution (article 3, § 1), the California court is bound by the express terms of the Fifth and Fourteenth Amendments and this Court's interpretations thereof.

Respectfully submitted,

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